Supreme Court, U.S.
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No. 98-325

In The

Supreme Court of the United States

October Term, 1997

JOHN DOE,

Petitioner,

vs.

BERKELEY PUBLISHERS, d/b/a
THE BERKELEY INDEPENDENT,

Respondent.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of South Carolina**

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does the First Amendment to the Constitution of the United States permit a newspaper to publish the name of a rape victim when the identity of the rape victim is obtained through an unofficial disclosure from a jail personnel insider?

2. May the State of South Carolina prohibit the publication of a rape victim's name when that name has not been publicly released as was the case in *The Florida Star v. B.J.F.*?

LIST OF PARTIES AND RULE 29.6 LIST

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of this Respondent's Brief in Opposition, except that respondent's correct corporate name is Berkeley Publishers, Inc., and, as stated in the Petition for Writ of Certiorari, the petitioner is proceeding in the fictitious name of John Doe. The petitioner's name is known to the parties and is disclosed in the newspaper article upon which the action is based.

The respondent is a South Carolina corporation. It has no parent company and it has no subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Berkeley Publishers, d/b/a The Berkeley Independent, respectfully submits this brief in opposition to the petition for a writ of certiorari filed by petitioner, John Doe.

CITATIONS OF OPINIONS AND ORDERS ENTERED IN THIS CASE

The Opinion of the Supreme Court of South Carolina sought to be reviewed by the petitioner herein is reported at 329 S.C. 412, 496 S.E.2d 636 (1998), and is printed as Appendix "B" to the petitioner's petition for a writ of certiorari. The Order of the Supreme Court of South Carolina refusing rehearing is unreported and is printed as Appendix "A" to said petition.

The Opinion of the South Carolina Court of Appeals is reported at 322 S.C. 307, 471 S.E.2d 731 (Ct.App. 1996), and is printed as Appendix "C" to said petition.

The bench ruling of the trial judge granting respondent's motion for directed verdict is not reported and the transcript thereof is printed as Appendix "D" to said petition. The formal written Order of the trial judge granting respondent's motion for directed verdict is not reported and is printed in the Appendix to this brief in opposition at p. 1a, *infra*. The Order of the trial judge denying petitioner's motion for reconsideration is not reported and is printed in the Appendix to this brief in opposition at p. 2a, *infra*.

JURISDICTION

Petitioner seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1257. Respondent questions the Supreme Court's jurisdiction at I, *infra*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. I

The text of this provision is reproduced in the petition at p. 3.

U.S. CONST. amend. VII

The text of this provision is reproduced in the petition at pp. 3-4.

U.S. CONST. amend. XIV, § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

S.C. CODE ANN. § 16-3-730 (1976)

The applicable part of the text of this provision is reproduced in the petition at p. 4.

S.C. CODE ANN. § 30-4-50(8) (1991)
[§ 30-4-50(A)(8) as amended by 1992
Act No. 269, § 1, effective February 24, 1992]

> Without limiting the meaning of other sections of this chapter, the following categories of information are specifically made public information subject to the restrictions and limitations of §§ 30-4-20, 30-4-40 and 30-4-70 of this chapter:
>
> * * *
>
> (8) Incident reports which disclose the nature, substance, and location of any crime or alleged crime reported as having been committed. Where an incident report contains information exempt as otherwise provided by law, the law enforcement agency may delete that information from the incident report.

STATEMENT OF THE CASE

On July 15, 1992, petitioner was arrested and charged with several serious crimes. The Berkeley County Grand Jury ultimately returned each of the indictments against petitioner for the alleged crimes with a designation of "No Bill." (R.pp. 113-120).[1] Prior to that disposition by the grand jury and while petitioner was being held in the Berkeley County Jail on the charges, petitioner was raped by another inmate.

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[1] References to the Record on Appeal before the South Carolina Court of Appeals and the Supreme Court of South Carolina are designated herein by the letter "R."

While petitioner was being held in the jail, a woman who identified herself as being related to the victim of the crimes allegedly committed by petitioner (R.p. 50, lines 11-22) called Allen Morris, the editor and publisher of the respondent's newspaper, *The Berkeley Independent*, and told him that petitioner had been "physically attacked" or "beaten up" in jail (R.p. 54, lines 14-19). Mr. Morris then called the Berkeley County Sheriff's office to confirm that information (R.p. 54, lines 14-22). He talked with Colonel Meade of the Berkeley County Sheriff's Department and Colonel Meade told him that petitioner was the victim of a sexual assault in the jail (R.p. 54, lines 14-22; p. 65, lines 10-20; p. 67, line 20-p. 68, line 4) and that there was an incident report reflecting that information (R.p. 55, lines 4-14; p. 67, line 20-p. 68, line 4).

Mr. Morris gave the information to his reporter who was working on a story about petitioner's arrest and, on July 29, 1992, respondent published an article in *The Berkeley Independent* in conjunction with and as a sidebar to the story reporting petitioner's arrest disclosing petitioner's identity (using his true name) as the victim of a rape by a fellow inmate while being held at the Berkeley County Jail. The article recounted the report of the offense, the results of a sexual assault examination performed on petitioner, and the arrest of a named suspect, who was charged with criminal sexual conduct, first degree, and placed under a $100,000 surety bond.

Petitioner thereafter instituted this action in the Court of Common Pleas for Berkeley County, South Carolina, and by his Amended Complaint in the action sought recovery of damages on an alleged cause of action for invasion of privacy and an alleged cause of action for

intentional infliction of emotional distress based upon the respondent's publication of the aforesaid article.

Petitioner's Answer to the Amended Complaint set forth qualified general denials to each of the causes of action, admitting the publication and content of the article concerned but denying the other material allegations of the Amended Complaint, except for allegations of residence of the parties and respondent's status as publisher of *The Berkeley Independent*. In addition, the Answer alleged that the information concerning petitioner was truthful information lawfully obtained concerning a matter of public interest and significance, and, as such, was privileged under the common law and the First and Fourteenth Amendments to the United States Constitution.

Trial of the case was bifurcated as to the issues of liability and damages and the issue of liability was tried before the Honorable R. Markley Dennis, Jr., and a jury on October 26, 1994. At the trial, there was testimony as to the circumstances regarding the publication of the article concerned as referred to above. Mr. Morris testified that the stories that identified petitioner as having been arrested and as having been raped at the Berkeley County Jail were reported because they were news (R.p. 68, lines 5-18). Mr. Morris further testified that he did not know of petitioner's name as the victim of a sexual assault in jail until Colonel Meade told him (R.p. 65, lines 17-20). There was also evidence that at some time over six months after publication of the article, an employee of respondent obtained from the Sheriff's Department a copy of the Sheriff's Department incident report that identified petitioner as the person who was said to have

been raped at the Berkeley County Jail. (R.p. 83, line 6-p. 84, line 9; p. 88, lines 2-10).

At the close of petitioner's case on the issue of liability, the trial judge orally granted a motion by respondent for directed verdict as to both causes of action and instructed counsel for respondent to prepare a formal order (Pet. App. "D"). Petitioner appealed the directed verdict prior to the filing of the formal order. On January 17, 1995, the trial judge filed his formal written Order for Directed Verdict (Resp. App. 2a). By Order dated March 15, 1995, the trial judge denied a motion by petitioner for reconsideration (Resp. App. 1a) and petitioner appealed that Order.

The appeal was assigned to the South Carolina Court of Appeals and was heard on January 11, 1996. The Court of Appeals affirmed the grant of a directed verdict on the cause of action for intentional infliction of emotional distress. However, because it concluded that the jury should decide whether publishing petitioner's name as a victim of sexual assault was a matter of public significance, the Court of Appeals reversed the grant of a directed verdict as to the cause of action for invasion of privacy and remanded the case for further proceedings consistent with its Opinion. (Pet. App. "C"). The Supreme Court of South Carolina granted respondent's petition for a writ of certiorari to review the decision of the Court of Appeals to the extent the said decision reversed the judgment of the trial court granting a directed verdict on the cause of action for invasion of privacy and remanding the case for further proceedings. The Supreme Court of South Carolina thereafter reversed the decision of the Court of

Appeals, holding that under state law, petitioner's invasion of privacy claim failed as a matter of law. (Pet. App. "B"). Petitioner's petition for rehearing of the decision was refused. (Pet. App. "A").

REASONS FOR DENYING THE WRIT

I. The Supreme Court Has No Jurisdiction To Review This Case

No federal question was determined by the decision of the Supreme Court of South Carolina reversing the decision of the Court of Appeals in this case so as to provide a jurisdictional basis for this Court's review. As pointed out in *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 387 (1986), this Court "has no authority to review state determinations of purely state law." Moreover, it is well settled that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, this Court's jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Herb v. Pitcairn*, 324 U.S. 117 (1945); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935).

It is apparent from the language of the Opinion of the Supreme Court of South Carolina in this case that the Court's decision is based entirely on South Carolina common law invasion of privacy principles as enunciated and applied in *Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1956). The Opinion points out that under the *Meetze* case, "[t]he issue in an invasion of privacy claim is whether the occurrence is a matter of legitimate public or

general interest." (Pet. App. "B"). In the Opinion, the Court held that the commission of a violent crime between inmates of a county jail is a matter of public significance as a matter of law without reference to or consideration of any constitutional issue. The Court held that "[t]he Court of Appeals erred in separating the plaintiff's identity from the event." (Pet. App. "B"). The Court went on to expressly hold:

> . . . *Under state law,* if a person, whether willingly or not, becomes an actor in an event of public or private interest, "then the publication of his connection with such occurrence is not an invasion of his right of privacy." *Meetze,* 230 S.C. at 337, 95 S.E.2d at 609. *Accordingly,* Doe's invasion of privacy claim fails as a matter of law, and the trial court's directed verdict was proper.

(Pet. App. "B"). (Emphasis supplied).

Furthermore, even if it is considered that the decision of the Supreme Court of South Carolina is contrary to that of the Court of Appeals with respect to the First Amendment issue discussed by the Court of Appeals, it is apparent that the Supreme Court of South Carolina decision is based on an independent and adequate state ground. The *Meetze* case predated this Court's decision in *The Florida Star v. B.J.F.,* 491 U.S. 524 (1989), by over thirty years and was not analyzed or decided on federal constitutional grounds. The *Meetze* case represents settled South Carolina common law and, contrary to petitioner's assertion that at the trial respondent "relied" on *The*

Florida Star (Petition, pp. 9-10), the *Meetze* case was submitted by respondent as an independent basis for granting respondent's motion for directed verdict on the invasion of privacy claim (R.p. 80, line 18-p. 82, line 12) and the trial judge's oral order granting the motion at trial was made not only with consideration of *The Florida Star* but also "given the Meetz [sic] case." (Pet. App. "D"). In his written Order for Directed Verdict, the trial judge held as one of the grounds for the decision granting respondent's motion that the petitioner was "not entitled to a recovery under South Carolina common law invasion of privacy principles" (Resp. App. p. 6a), citing the *Meetze* case for the principle that "when one, willingly or not, becomes an actor in an occurrence of public or general interest, he has no claim for invasion of privacy for publications connected with such occurrence." (Resp. App. p. 6a). The Opinion of the Supreme Court of South Carolina in the instant case makes it clear that the same state common law ground applied in the *Meetze* case was dispositive in the instant case.

II. The Questions Presented For Review In The Petition Are Not In Fact Raised By The Decision Below Or By The Record

The Questions Presented for Review by the petitioner are both framed as issues under the First Amendment to the Constitution of the United States. However, as discussed hereinabove, the decision of the Supreme Court of South Carolina from which review is sought is a decision based solely on state common law and does not present any First Amendment question for review by this Court.

Furthermore, the factual premises for the petitioner's Questions Presented for Review are not supported by the record. Petitioner's first Question Presented for Review is grounded in the assumption that the identity of the rape victim in this case was obtained through an "unofficial disclosure" from a jail personnel insider. Petitioner presents no basis for characterizing as an "unofficial disclosure" the response made by a Sheriff's Deputy to a request for information on a call made by news personnel. Similarly, there is no basis for the factual predicate of the second Question Presented for Review that the rape victim's name was not "publicly" released. There was no evidence of any restriction made by the Sheriff's Deputy on publication of the information which he supplied. The unrestricted release of information to the press is obviously the equivalent of public release. Moreover, the evidence showed that respondent's editor was told by the Sheriff's Deputy prior to publication of the news article that an incident report existed reflecting that petitioner had been raped at the Berkeley County Jail. (R.p. 54, line 3-p. 55, line 14; p. 67, line 20-p. 68, line 4). The evidence also showed that the incident report was subsequently obtained from the sheriff's office. (R. p. 83, line 6-p. 84, line 9; p. 88, lines 1-10). An incident report which discusses the nature, substance and location of any crime or alleged crime reported as having been committed is specifically made "public information" under the terms of the Freedom of Information Act in effect at the time concerned. S.C. CODE ANN. § 30-4-50(8) (1991) [§ 30-4-50(A)(8) as amended by 1992 Act No. 269, § 1, effective February 24, 1992]. It is thus apparent that the circumstances of the present case are not reflected in the Questions Presented

for Review by petitioner and that resolution of the Questions Presented for Review as stated by petitioner would result only in an impermissible advisory opinion.

III. In Addition To The State Law Ground For The Decision Of The Court Below, The Evidence Establishes That The Cause Of Action For Invasion Of Privacy Was Barred As A Matter Of Law By The Decision Of The Supreme Court Of The United States In *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989)

Even if the applicability of the free press guarantee of the First Amendment to the United States Constitution is considered as an issue for review by this Court, the evidence establishes that the cause of action for invasion of privacy is barred by the decision of this Court in *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

An issue of whether imposition of damages against respondent on the cause of action for invasion of privacy is inconsistent with the constitutional protection of the First Amendment would have to be decided under the test first enunciated in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979), and adopted in *The Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989), as follows:

> . . . [I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order. . . .

There is no dispute in this case that the information that petitioner was the victim of a sexual assault was lawfully obtained and there is no issue as to the truthfulness of the information. In addition, under the standard established by *The Florida Star*, petitioner's identity as the victim of a sexual assault was clearly a matter of public significance.

As in the instant case, the news article concerned in *The Florida Star* involved a news report of a sexual assault that identified the name of the victim. The victim sought recovery of damages for the publishing of her name and the defendant newspaper invoked the constitutional protection of the First Amendment. Under the approach followed by the Supreme Court in *The Florida Star* for determining whether the article concerned a matter of public significance for the purpose of resolving the constitutional issue, the plaintiff's identity as the victim of a sexual assault was a matter of public significance because it was regarded as included in the public significance of the general subject of the article. In holding that the element of public significance was met in *The Florida Star*, the Supreme court expressly focused upon the subject matter of the article "generally" as the controlling factor, "as opposed to the specific identity contained within it. . . . " The Court held (491 U.S. at 536):

> . . . It is, clear, furthermore, that the news article concerned "a matter of public significance," 443 U.S., at 103, 99 S.Ct., at 2671, in the sense in which the *Daily Mail* synthesis of prior cases used that term. That is, the article generally, as opposed to specific identity contained within it, involved a matter of paramount public import: the commission, and investigation, of a violent

> crime which had been reported to authorities. . . .

The news article in the instant case thus clearly concerns a matter of public significance as a matter of law under the test established in *The Florida Star* for the purpose of determining the constitutional issue of the applicability of the free press guarantee. The evidence in the instant case fits squarely within the decision in *The Florida Star*. As in *The Florida Star*, the article in the instant case "generally" involved "the commission, and investigation, of a violent crime which had been reported to authorities." No evidence or circumstance creates any issue with respect to that fact.

It is apparent from the analysis in *The Florida Star* that imposition of liability for damages on petitioner's cause of action for invasion of privacy would not serve "a need to further a state interest of the highest order" (491 U.S. at 537) as "narrowly tailored" (491 U.S. at 541) to such an interest so as to be outside the scope of the constitutional protection of the free press guarantee. It is undisputed that in the instant case a representative of the Berkeley County Sheriff's Department gave respondent the information that petitioner was the victim of a sexual assault. Similarly, a sheriff's department was the source of the information identifying the plaintiff in *The Florida Star* as the victim of a sexual assault. As one of three "independent reasons" (491 U.S. at 537) for finding the imposition of liability for damages "too precipitous a means" (491 U.S. at 537) of advancing the asserted state interests to satisfy the "need" required by the constitutional standard for imposing such liability, the Supreme

Court in *The Florida Star* pointed to the manner in which the information was obtained, saying (491 U.S. at 538):

> . . . [W]here the government itself provides information to the media, it is most appropriate to assume that the government had, but failed to utilize far more limited means of guarding against dissemination than the extreme step of punishing truthful speech. . . . Where, as here, the government has failed to police itself in disseminating information, it is clear under *Cox Broadcasting, Oklahoma Publishing* and *Landmark Communications* that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity. See *supra*, at 2609. Once the government has placed such information in the public domain, "reliance must rest upon the judgment of those who decide what to publish or broadcast," *Cox Broadcasting*, 42 U.S., at 496, 95 S.Ct., at 1047, and hopes for restitution must rest upon the willingness of the government to compensate victims for their loss of privacy and to protect them from the other consequences of its mishandling of the information which these victims provided in confidence.

The undisputed facts shown by petitioner's evidence established that the cause of action for invasion of privacy was barred as a matter of law by the decision of the Supreme Court of the United States in *The Florida Star*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 22, 1998

APPENDIX

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

[John Doe],

Plaintiff,

vs.

Berkeley Publishers, d/b/a The Berkeley Independent,

Defendant.

IN THE COURT OF COMMON PLEAS

C. A. No. 93-CP-08-133

ORDER DENYING MOTION FOR RECONSIDERATION

This matter came before the court on motion of the plaintiff pursuant to Rule 59(e) *SCRCP*. Plaintiff's motion was premised on his position that the court lacked jurisdiction to enter a written order for a directed verdict and that the written order did not reflect the bench ruling for a directed verdict in favor of the defendant.

A hearing was held by telephone on March 10, 1995, with attorneys for the parties participating.

Based on the argument of counsel, plaintiff's motion is hereby denied.

AND IT IS SO ORDERED.

/s/
R. MARKLEY DENNIS, JR.
CIRCUIT JUDGE

Moncks Corner, South Carolina
March 15, 1995

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

[John Doe],

Plaintiff,

vs.

Berkeley Publishers, d/b/a The Berkeley Independent,

Defendant.

IN THE COURT OF COMMON PLEAS

C. A. No. 93-CP-08-133

ORDER FOR DIRECTED VERDICT

The July 29, 1992 edition of the *Berkeley Independent* newspaper contained two news stories that mentioned [John Doe], the plaintiff in the within action. The first story reported that [Doe] and another had been arrested and jailed for tying up a St. Stephen woman, dousing her with gasoline and setting her mobile home on fire. The second story reported that while [Doe] was being held in Berkeley County jail on those charges, he was raped by a fellow inmate. [Doe] filed suit against the owner of the newspaper claiming an invasion of privacy for publishing his name in the rape story. [Doe's] complaint was amended to add a second cause of action for intentional infliction of emotional distress.

The matter came on for trial on October 26, 1994. The court proposed, and the parties did not object to, a bifurcation of the trial to allow the liability issues to be considered prior to presentation of damages testimony. The bifurcation of the trial seemed appropriate as plaintiff's pre-trial brief indicated that there were no disputed issues of fact with regard to liability. Additionally, the

bifurcation would have the benefit of sparing [Doe] the expense of a medical expert on the damages issues in the event the liability question was resolved in favor of defendant.

[Doe] called the publisher of the newspaper who testified that the newspaper was preparing a story on [Doe's] arrest when he received a call from a woman who stated the she had heard that [Doe] had been "beaten up" while in jail. Seeking confirmation of this information, the publisher called the Berkeley County Sheriff's Department and talked with Col. James Meade. Col. Meade advised the publisher that [Doe] had not been "beaten up," but that he had been sexually assaulted by another inmate.

The publisher testified that a police incident report identifying [Doe] as the victim of a sexual assault was prepared by the Berkeley County Sheriff's Department. [Doe] also called Mary Bailey, a former reporter and editor for the *Berkeley Independent* who testified that when she obtained a copy of the incident report months after the sexual assault of [Doe], [Doe's] name was contained in the incident report identifying him as the victim of a sexual assault in the jail.

The publisher of the paper testified that the two news stories identifying [Doe] were consistent with the paper's publication of news relating to the commission of crime in the community. The publisher testified that the story identifying [Doe] as a rape victim also raised issues concerning the performance of public officials in the operation of the jail and the safekeeping of prisoners. Asked why [Doe] was named in the story, the publisher testified

that [Doe's] identity was already being disclosed in the story reporting on his arrest, and the identity was a part of the news reported in the rape story. Asked if the paper published the identity of other rape victims, the publisher replied that he did not recall another instance where the sexual assault had occurred on a person who was in the custody of the county accused of violent crimes.

Asked if the identification of [Doe] in the story was designed to increase paper sales or circulation, the publisher testified that [Doe's] name was used because it was news. Asked if the publisher had considered the effect of the publication on [Doe], the publisher testified that he did not know [Doe] and had not thought about how [Doe] might feel about the story.

At the close of plaintiff's evidence, defendant moved for a directed verdict. On the issue of the invasion of privacy claim, defendant argued that the United States Supreme Court decision in *Florida Star v. BJF*, 491 U.S. 524, 109 S.Ct. 2603, 105 L.E.2d 433 (1989) and the decision of the Supreme Court of South Carolina in *Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1956) compelled the direction of a verdict.

In *Florida Star*, the United States Supreme Court reversed an award of damages to a rape victim whose name had been published in a newspaper after the name had been disclosed to the public and press by the inadvertent release of a police incident report. The court held that imposing damages on a newspaper for publishing the name of a rape victim which had been obtained from publicly released police documents was inconsistent with the First Amendment to the United States Constitution.

The *Florida Star* decision has been distilled to a three-part test which precludes the imposition of liability when a newspaper publishes information that has been lawfully obtained, that is truthful and about a matter of public significance. *Upchurch v. New York Times Co.*, ___ S.C. ___, 431 S.E.2d 558 (1993).

Here there was no dispute that the information published by defendant was truthful or that it was obtained from a law enforcement official. As to the question of public significance, the testimony of the publisher established that reports of violent crime are designed to inform the community of criminal conduct and efforts to control it. While the undisputed testimony of the publisher indicates that news stories regarding criminal activity are published because they are matters of public interest and significance, the question of public significance seems to be one of law under the *Florida Star* decision. Under that authority, the news article, generally, as opposed to the specific identify of the plaintiff contained within the article, involved a matter of "paramount public import: the commission, and investigation of a violent crime which had been reported to authorities." *Florida Star, supra*, 109 S.Ct. 2603 at 2611. In other words, the public significance is measured by the subject matter of the article not the identify of the plaintiff contained in the story.

Plaintiff argued that *S.C. Code Ann.* §16-3-730 (1976) which prohibits the publication of a sexual assault victim's name indicates a legislative choice to shelter the identity of rape victims from public awareness. While that may have been the intention of the legislature, it must be noted that a similar statute was advanced in the *Florida Star* case as the basis for defendant's liability, and

that argument was rejected on First Amendment considerations. Further, the Supreme Court of South Carolina held in *Dorman v. Aiken Communications*, 303 S.C. 63, 398 S.E.2d 687 (1990) that §16-3-730 does not provide a basis for civil liability through private causes of action claiming violations of the statute.

Plaintiff argues that the case before the court is not a "constitutional" case, but one involving a common law claim of invasion of privacy. This argument ignores the inherent tension between the right of privacy and the right of the press and the interest of the public in having a free dissemination of news and information. *Meetze, supra*. But, even if plaintiff's argument were persuasive, he is still not entitled to a recovery under South Carolina common law invasion of privacy principles. As the Supreme Court of South Carolina held in *Meetze, supra*, when one, willingly or not, becomes an actor in an occurrence of public or general interest, he has no claim for invasion of privacy for publications connected with such occurrence. And, where the details of the occurrence are required by law to be reported in a public record, no claim can be made for invasion of privacy. Plaintiff argues that the paper's delay in obtaining the police incident report which contained details of plaintiff's sexual assault, including his name, precludes the public record from being used as a shield against an invasion of privacy claim. This argument is inconsistent with *Meetze* where the public record was not obtained by the defendant prior to publication because the public record, a birth certificate, was not created until several weeks after publication of the story giving rise to the invasion of

privacy claim. The record in the present case is an incident report which under South Carolina law is to disclose information regarding crimes reported as having been committed and which is specifically a matter of public information under *S.C. Code Ann.* §304-50(8) (1976). While it might be argued that the identity of a rape victim could have been withheld by the Sheriff's Department, there was no obligation on the part of the Sheriff's Department to withhold the name from the public or delete it from the incident report. *S.C. Tax Comm. v. Gaston Copper Recycling Corp.*, 17 Davis Adv.Sh.Op.No. 24124 (7/18/94); *Bellamy v. Brown*, 305 S.C. 291, 408 S.E.2d 219 (1991).

The intentional infliction of emotional distress claim was recognized in South Carolina in *Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981). The elements of the cause of action identified in *Ford* require the plaintiff to prove that the defendant intentionally or recklessly inflicted severe emotional distress or was certain that such distress would follow from his conduct that the conduct was so extreme and outrageous as to exceed all possible of decency, that the actions of the defendant caused the plaintiff's emotional distress and the distress suffered by the plaintiff was so severe that no reasonable man could be expected to endure it. In considering a motion for a directed verdict, it is for the court to determine whether defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit a recovery on this theory, and only where reasonable persons may differ is the issue one for presentation to the jury. *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 321 S.E.2d 602 (Ct.App.1984), rev'd on other grounds, 287 S.C. 190, 336 S.E.2d 472 (1985). This consideration is to be made in the

context of the limited nature of the "outrage" tort which is not a replacement for existing torts, but a theory of recovery where the historical torts fail to provide relief. F.P. Hubbard & R.L. Felix, *South Carolina Law of Torts* (1990) at p. 346.

In *Todd*, the Court of Appeals noted that three factors are usually present to support a claim. First, there is a pre-existing relationship between the parties, *e.g.*, debtor-creditor, insurer-insured. Second, the defendant's conduct arises in the exercise of excessive self-help in asserting a legal right or avoiding a legal obligation flowing from the pre-existing legal relationship. Third, the evidence shows clearly that the defendant calculatedly inflicted suffering or heedlessly and contemptuously disregarded the plaintiff's emotional suffering. *Todd, supra*, 321 S.E.2d at 610.

In the case before the court, there was no pre-existing legal relationship between plaintiff and defendant, there was no use of self-help in asserting some right or avoiding an obligation arising out of the relationship and no testimony to establish that defendant's conduct was directed at the plaintiff. As the Supreme Court of South Carolina held in upholding a directed verdict in favor of a newspaper on a claim arising out of the publication of a news story, even conduct that is intentional and outrageous cannot provide the basis for an intentional infliction of emotional distress claim unless it is conduct directed at the plaintiff or occurring in the presence of a plaintiff of whom the defendant is aware. *Upchurch, supra*. Likewise, as discussed fully above, and as the Supreme Court of South Carolina held in *Upchurch, Florida Star* precludes the imposition of liability where a

newspaper publishes truthful information lawfully obtained about a matter of public significance.

Based on the foregoing discussion, it is clear that plaintiff lacks any evidence to support any element of his claims for invasion of privacy or intentional infliction of emotional distress. Viewing the evidence and all inferences which may reasonably be drawn from the evidence in the light most favorable to the plaintiff, it appears that defendant's motion for directed verdict should be granted.

AND IT IS SO ORDERED.

/s/
R. MARKLEY DENNIS, JR.
CIRCUIT JUDGE

Moncks Corner, South Carolina
November 7, 1994